Supreme Court, U.S.
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No. 94-971

In the

Supreme Court of the United States

October Term, 1994

Eugene and Carol Campbell,

Petitioners

vs.

Leech Lake Band of Chippewa Indians, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT LEECH LAKE BAND OF CHIPPEWA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is any conflict between state courts of last resort on the law to be applied in determining whether good cause has been established pursuant to the provisions of the Indian Child Welfare Act, 25 U.S.C. Section 1901-63?

2. Whether the State of Minnesota may consider the provisions of the Indian Child Welfare Act as federally mandated minimum protections to be afforded in proceedings where the federal statute is applicable?

LIST OF PARTIES

Carol and Eugene Campbell, Petitioners

Leech Lake Band of Chippewa Indians, Respondents

Diane White, Guardian ad Litem, Respondent

Minnesota Department of Human Services, Respondent

Beltrami County Social Services, Respondent

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STATEMENT OF THE CASE

The three children who are the subject of this proceeding are enrolled members of the Leech Lake Band of the Minnesota Chippewa Tribe. They have lived their entire lives on the Leech Lake Reservation and the Fond du Lac Reservation in northern Minnesota. These three children have developed close ties to their family and their Indian communities there.

At the trial, the Leech Lake Band presented the testimony of nine expert witnesses who qualified as Indian expert witnesses under the ICWA and under the Minnesota Department of Human Services Manual, XIII-3586 (Jan. 30, 1987). All of these Indian expert witnesses testified that these three children should remain in the Indian foster home of A.C. where all of their emotional, educational, physical and cultural needs were being met. All of the Indian expert witnesses testified that these three children, perhaps more than other Indian children, needed strong ties to their tribe and that this could provide them with a lifetime of stability. The treating psychotherapist for all three children, Michele Gordon, testified at the trial. Michele Gordon, herself a tribal member, testified that these three children were best served by a placement in an Indian home.

The Campbells produced only two Indian expert witnesses, one a non-Indian who knew the Campbells only from church, the other who had met the Campbells only three days before testifying on their behalf and who had never met the children. Both of the expert witnesses presented by the Campbells admitted that they had no knowledge of the home of A.C. The Leech Lake Band presented the testimony of three Indian social workers all who testified about the severe emotional and psychological problems that Indian children often suffer when they were raised in non-Indian homes.

The Minnesota Supreme court found that two of the children had been placed in a total of five homes and the oldest child in a total of six homes by the time they were placed in the Campbell home. The children were placed in the A.C. Indian foster home in November of 1992. The children remained in that home for approximately two years. In post-decisional proceedings, the children have been placed in the home of their great aunt and uncle, Melvin and Audrey Goodman. Melvin and Audrey Goodman have participated in these proceedings as amici. Melvin and Audrey Goodman filed a petition to adopt all three children in March of 1994. Appendix at A-1.

REASONS FOR DENYING THE WRIT

This dispute involves efforts by the tribe of these three children, the county of their residence and the Minnesota State Department of Human Services to ensure that these three Indian children would remain in an Indian foster home until they are ultimately adopted by their great aunt and uncle with whom they now live. The Minnesota Supreme Court has held that Minnesota courts should use one of the bases found in the BIA Guidelines for declining to follow the placement preferences found in the ICWA. The Minnesota Court has held that there should be something more than merely the best interests of the child standard which applies to every child in Minnesota. The Minnesota Supreme Court held that based upon the facts as they were presented concerning these three children good cause was not established to ignore the preferences of the ICWA.

THE MINNESOTA SUPREME COURT IS IN ACCORD WITH THE UNITED STATES SUPREME COURT AND WITH STATE COURTS OF LAST RESORT

The Petitioners have attempted to convince this Court that a conflict exists between the recent decision of the Minnesota Supreme Court in In the Matter of the Custody of S.E.G, A.L.W. and V.M.G., 521 N.W. 2d 357 (1994) (hereinafter S.E.G.) and the Alaska Supreme court on the interpretation of 1915(a) of the Indian Child Welfare Act 25 U.S.C. Section 1901-63 (1978). A thorough reading of the two cases from state courts of last resort that deal directly with section 1915(a) of ICWA, show that there is no conflict. Moreover, the recent decision of the Minnesota Supreme Court is congruent with this Court's decision in Mississippi Band of Choctaw Indians v. Holyfield, 109 S.Ct. 1597 (1989) (hereinafter Holyfield).

In this Court's decision in Holyfield, the central issue concerned the proper jurisdiction of the proceedings and not whether "good cause" had been established to ignore the placement preferences of ICWA. However, in making its determination in S.E.G the Minnesota Supreme Court looked to the Holyfield decision in acknowledging that state courts have indeed contributed to the problem that the ICWA was intended to remedy. S.E.G. at 362. The Minnesota Supreme Court furthermore, recognized that its own Task Force on Racial Bias in the Judicial System had indicated that "insensitivity to minority cultures remains a problem in child welfare cases." S.E.G. at 362-363, citing, Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, Final Report, 16 Hamline L.Rev. 477, 624-646 (1993). The court goes on to point out that in Minnesota for Native American children in particular, their over-representation in out-of-home placements exceeded white children by over 10 times. Id. at fn. 6. As a matter of policy, the Minnesota court has chosen

to review the removal of Indian children from their communities and families very carefully.

There are other good reasons for this careful review by the Minnesota court. In enacting the Indian Child Welfare Act, Minnesota was cited in testimony to Congress as having placed:

> one in eight Indian children under the age of 18 . . . in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes.

Holyfield at 1600. The Minnesota Court as a matter of policy is attempting to respond appropriately to the findings of Congress in enacting ICWA and to its own studies of its own courts concerning bias. Historically, the Minnesota court system has had difficulty in dealing fairly with its minority children. This most recent decision is a positive step forward in remedying those difficulties.

There are two decisions from the Alaska Supreme Court upon which the petitioners heavily rely to show some conflict among the state courts on this issue. In the Matter of the Adoption of F.H., (hereinafter F.H.) 851 P.2d 1361 (Alaska 1993) and Adoption of N.P.S., (hereinafter N.P.S.) 868 P.2d 934 (Alaska 1994). In these two cases, the Alaska Supreme Court followed the same line of reasoning that the Minnesota Court has followed. Both the Minnesota and Alaska courts hold that good cause to deviate from the placement preferences of ICWA should look for guidance to the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,594 Section F.3

(1979). See, F.H., 851 P.2d at 1364; N.P.S., 868 P.2d at 936 and S.E.G., 521 N.W. 2d at 361.

All three of these cases look to the BIA Guidelines for assistance in interpreting the provisions of the ICWA. The Alaska Supreme Court acknowledges that these BIA Guidelines are to assist but do not bind the courts. F.H., 851 P.2d at 1354; N.P.S., 868 P.2d 936. In both of these decisions, the Alaska Supreme Court followed the guidelines and found that under the specific facts of each case they clearly fit under one or more of the exceptions delineated in the BIA Guidelines.

In F.H., the Alaska Supreme Court held that both the "ICWA and the [BIA] Guidelines indicate that courts may consider parental preference when determining whether there is good cause to deviate from ICWA preferences". Id. at 1364. From there the court goes on to say that therefore the parental preference was an appropriate factor for the superior court to consider in its finding of good cause. Clearly, the Alaska court is closely adhering to the BIA Guidelines.

The Alaska court also briefly discusses this particular child's need for permanence. F.H. at 1365. The court notes that the relinquishment of parental rights is conditioned upon the adoption by the family chosen by the biological mother. The Alaska court notes that "[i]t was not clearly erroneous for the superior court to find that F.H.'s uncertain situation would have continued if the Hartleys were not allowed to adopt F.H.". Id. The Alaska court has allowed that permanence may be considered just as the Minnesota court has allowed that permanence may be considered in reaching these determinations. The court in Minnesota distinguished the facts before it from those facts presented to the Alaska court in F.H.. S.E.G. at 363.

In N.P.S the Alaska court again examined the question of whether good cause had been established to allow an adoption of an Indian child which did not follow the placement

preferences of the ICWA. Again the Alaska court looked to the BIA Guidelines and found that under the facts presented there evidence existed to support the findings that both the parent and the child had expressed a preference for such an adoption. N.P.S. at 937. The BIA Guidelines clearly allow that an exception to the placement preferences could be based on "[t]he request of the biological parents or the child when the child is of sufficient age." BIA Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,594 Section F.3 (i)(1979).

This recent decision by the Minnesota court is not inconsistent with the position taken by the Alaska court. Rather the Minnesota Supreme Court has simply chosen to follow the holdings of the Alaska court. The difference in the outcome between the two courts is based in the facts that were presented to each court. The Minnesota court has held that "a determination that good cause exists to avoid the placement preferences of section 1915 should be based upon a finding of one or more of the factors described in the [BIA] guidelines." S.E.G. at 363 (emphasis added). This is the same line of reasoning which has been applied in Alaska and in other jurisdictions.

The petitioners look to these other jurisdictions to find a conflict. In In the Matter of the Appeal in Maricopa County, 136 Ariz. 528, 667 P.2d 228 (Ariz.App. 1983) the court ruled that the tribe merely waited until too late in the proceedings to establish the paternity of the child and that the ICWA was not applicable to the proceedings. In In the Matter of N.L., 754 P.2d 863 (Oklahoma 1988) the court affirmed a lower court's decision to not transfer the proceedings to tribal court, but remanded to the lower court for findings on whether there was good cause to ignore the placement preferences. There was no evidence in the record on the latter issue so the court could not rule. In In re Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988) cert denied, 490 U.S. 1069 (1989) the court is

concerned largely with a request to transfer the proceedings to tribal court. As to the placement preferences, this court does not mention the BIA Guidelines but rather chooses to focus on the bonding of seven years with the adoptive parents to establish good cause. In In the Matter of the Adoption of M., 832 P.2d 518 (Wash.App.Div.2 1992) the court merely held that the Act did apply to the proceedings and remanded to the trial court for findings regarding the placement preferences. This court looks to the BIA guidelines for guidance and states that many factors should be considered including but not necessarily limited to the best interests of the child.

THE MANDATES OF ICWA ARE MINIMUMS ESTABLISHED BY CONGRESS TO BE USED BY COURTS

In establishing the standards to be applied in state court proceedings involving Indian children, Congress allowed that state courts may set higher standards than those found in the ICWA:

> In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

25 U.S.C. Section 1921 (1978).

If there is any slight inconsistency between the decisions of Alaska and Minnesota, it may be that Minnesota has chosen to set some higher standards than those mandated by the federal law. The Minnesota courts have set some higher

standards on the issue of qualifying experts as Indian experts under the ICWA. In In the Matter of the Welfare of B.W., 454 N.W. 2d 437, 443(Minn.App. 1990), the court held that:

> [t]he sole exception to the supremacy of the federal scheme in the ICWA over state law is contained in section 1921 of the ICWA itself ...[at] 25 U.S.C. Section 1921(1982). Thus, section 1921 mandates application of state standards which more stringently protect Indian tribal and parental rights than does the ICWA itself.

In addition to this section of the federal statute, the BIA Guidelines specifically state that "the legislative history of the Act states explicitly that the use of the term 'good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child. Citing S.Rep. No. 95-597, 95th Cong., 1st Sess.17 (1977) Consequently, if a state court decides to set higher standards than those mandated in the ICWA thereby exercising its flexibility, there will then inevitably be some variations among the standards used by state courts. Congress and the Bureau of Indian Affairs have anticipated and even endorsed the possibility that there would be varying standards among the state courts as long as ICWA was seen as a federally mandated minimum protection.

CONCLUSION

These children are currently residing in the home of their great aunt and uncle awaiting the opportunity to be adopted by these relatives. This is exactly the outcome sought by Congress in enacting the Indian Child Welfare Act. The Minnesota Supreme Court has found that under these specific facts and for these three children good cause was not

established to ignore the placement preferences. Minnesota's decision is largely consistent with the decisions of other jurisdictions. Any slight variations are allowed given the role of the Indian Child Welfare Act as a federal minimum and the flexibility accorded to state courts.

For the reasons stated, this Court should deny the requested Petition for the Writ of Certiorari.

Dated: December 29, 1994

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STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT

---------- COURT FILE NO.____

In Re the Matter of the Welfare of:

SIERRA E. GRAHAM, AMBER L. WHIPPLE, AND VELVET M. GRAHAM,

Minor Children

AMENDED PETITION FOR ADOPTION

and the Petition of:

MELVIN E. GOODMAN and **AUDREY J. GOODMAN,**

Petitioners.

Your Petitioners respectfully represent and show to the Court:

1. That they are husband and wife and were married on November 13, 1993 in Cass County, Minnesota; that their full names are Melvin Eugene Goodman and Audrey Jean Goodman; that their respective ages are 46 and 44;

2. That your Petitioners' place of residence is in the County of Beltrami, State of Minnesota, upon the Leech Lake Reservation; that they have resided in the State of Minnesota for more than one year immediately preceding the filing of this Petition;

3. That your Petitioner, Melvin E. Goodman, is an extended family member of the children and is blood-related to

the children; that Melvin E. Goodman is the brother of the children's grandmother, Leona Whipple;

4. That the Petitioner, Melvin E. Goodman, is an enrolled member of the White Earth Band of the Minnesota Chippewa Tribe; that the Petitioner, Audrey J. Goodman, is an enrolled member of the Red Lake Band of Chippewa;

5. That Petitioners have not had physical custody of the children to date;

6. That the children were born in the County of Beltrami, State of Minnesota, on March 15, 1984, July 20, 1985, and November 25, 1987, respectively;

7. That these children are all enrolled members of the Leech Lake Band of the Minnesota Chippewa Tribe;

8. That the mother of said children is Alice Whipple Graham and that the father is Terry Graham; that the parental rights of the father and mother were terminated in December of 1991; that the guardian of the children is the Minnesota Commissioner of Human services;

9. That the actual names of the children and any known aliases are Sierra Elizabeth Graham, Amber Louise Whipple, and Velvet Michele Graham;

10. That your Petitioners desire to have the names of the children changed to Sierra Elizabeth Goodman, Amber Louise Goodman, and Velvet Michele Goodman;

11. That the description and value of any real or personal property owned by said children are toys and clothing of nominal value;

12. That your Petitioners desire that the relationship of parent and child be established between Petitioners and the children, and that it is in the best interests of the children that they be adopted by Petitioners;

13. That your Petitioners' are preferred placements for these children under the Indian Child Welfare Act (ICWA), 25 U.S.C. §1915(a), as they are members of the childrens' extended family.

WHEREFORE, your Petitioners pray the honorable Court leave to adopt as their own children: Sierra Elizabeth Graham, Amber Louise Whipple, and Velvet Michele Graham, and that the name of said children be changed to Sierra Elizabeth Goodman, Amber Louise Goodman, and Velvet Michele Goodman, and that such other orders may be made as law and justice require.

Dated: March 31, 1994

s/s

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